

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LISA M. TREECE,)	
)	No. CV-05-0335-MWL
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
JO ANNE B. BARNHART,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on May 8, 2006. (Ct. Rec. 11, 14). Plaintiff Lisa M. Treece ("Plaintiff") filed a reply brief on May 5, 2006. (Ct. Rec. 16). Attorney Maureen Rosette represents Plaintiff; Special Assistant United States Attorney Thomas M. Elsberry represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 14) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 11).
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JURISDICTION

On April 5, 2002, Plaintiff applied for Supplemental Security Income ("SSI") benefits alleging disability since January of 2002, due to musculoskeletal pain, migraine headaches and dizziness. (Administrative Record ("AR") 71-74, 80).¹ Her application was denied initially and on reconsideration. On October 21, 2003, Plaintiff appeared before Administrative Law Judge ("ALJ") Mary B. Reed, at which time testimony was taken from Plaintiff, Plaintiff's husband, Timmy Lee Treece, medical expert Arthur B. Craig, M.D., and vocational expert K. Diane Kramer. (AR 261-333). On November 17, 2004, the ALJ issued a decision finding that Plaintiff was not disabled. (AR 23-34). The Appeals Council denied a request for review on October 8, 2005. (AR 6-9). Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g) on October 26, 2005. (Ct. Rec. 2).

STATEMENT OF FACTS

The facts have been presented in the administrative hearing transcript, the ALJ's decision, the briefs of both Plaintiff and the Commissioner and will only be summarized here. Plaintiff was 35 years old on the date of the ALJ's decision, has a high school education and attended about one and one-half years of cosmetology school. (AR 24, 279-280). Plaintiff has past relevant work as a fish packer, a fish grader, a fish bin tender, a waitress and a

¹Plaintiff previously filed applications for benefits which were denied initially on November 3, 1993, and on November 22, 1996. (AR 23). The ALJ found no reason to reopen these prior determinations. (AR 23).

1 cashier II. (AR 24).

2 At the administrative hearing held on October 21, 2003,
3 Plaintiff testified that she stands five feet tall and weighs 190
4 pounds. (AR 279). She is married and has three children, ages
5 six, 11 and 12. (AR (279). She testified that she last worked in
6 1996 and decided to quit working so that she could stay at home
7 and raise her children. (AR 283-284). She reported to smoking a
8 half pack of cigarettes each day. (AR 314).

9 Plaintiff stated that she injured her back, neck, hips and
10 ribs in Alaska when one of her friends gave her a bear hug. (AR
11 282, 285-286). She indicated that she has suffered migraine
12 headaches her entire life, but the cold weather and the injury
13 from the bear hug made the migraines worse. (AR 282). She
14 testified that she has migraine headaches every day and, on
15 average, they last for days. (AR 297).

16 She indicated that she has suffered pain in her left shoulder
17 for which she needed to have surgery. (AR 289-290). Following
18 surgery, she continues to have shoulder pain and is only able to
19 lift her arm up to chest level. (AR 290-291). Plaintiff also
20 indicated that she wears bilateral wrist braces at all times
21 because she has the beginning stages of carpal tunnel syndrome.
22 (AR 267, 291). She stated that her wrists are swollen at the
23 joints and, in the cold weather, her hands swell up and she is not
24 able to move her joints well. (AR 267, 291-292). As a result,
25 she cannot write for very long, cannot open jars and has
26 difficulty holding onto things. (AR 291, 293). Plaintiff
27 indicated that her hands swell and she is not able to bend her
28 fingers for three-quarters of the day. (AR 294). She stated,
however, in the summertime and when she is not around cold, she

1 does not have as many problems with her hands. (AR 294-295). She
2 stated that she also has problems with leg spasms (AR 288), dizzy
3 spells that occur about six times each day (AR 298), difficulty
4 with sleep (AR 299-300), constant diarrhea (AR 300-301), and knee
5 pain (AR 304-305). She also indicated that she has trouble with
6 her memory since December of 1996 and has to write down dates and
7 numbers or she will forget them. (AR 308-309). She stated that
8 she is allergic to wood smoke, chemical and asphalt smells trigger
9 her migraines and halogen lights hurt her head. (AR 309).

10 Plaintiff testified that she is able to sit for 20 or 30
11 minutes before needing to stand up and move around, stand for 10
12 to 20 minutes, and walk about half a block. (AR 303). She
13 indicated that she experiences pain when bending at the waist and
14 climbing stairs. (AR 303-304). She stated that she could only
15 lift and carry a gallon of milk or about eight pounds using both
16 hands and indicated that she gets really tired and needs to take
17 about two naps a day that last about one to one and one-half hours
18 each. (AR 306-307, 312).

19 With regard to chores and housework, Plaintiff testified that
20 she does a small amount of laundry and cleans the dishes if there
21 are just a few, but that her husband helps with the grocery
22 shopping and her children help with the housework. (AR 306). She
23 does not drive and has never obtained a driver's license. (AR
24 307-308). Either her husband transports her or she will take a
25 taxi. (AR 307). It was reported in July of 2002 that she could
26 walk for a half-hour, stand for an hour, sit for two hours and do
27 yard work (including pulling weeds and mowing the lawn). (AR 315-
28 317). However, Plaintiff stated that, after her surgeries, she
could no longer perform activities at this level. (AR 316-317).

1 Also giving testimony at the administrative hearing held on
2 October 21, 2003, were Plaintiff's husband, Timmy Lee Treece, (AR
3 320-323), vocational expert K. Diane Kramer (AR 325-331), and
4 medical expert Arthur D. Craig (AR 270-278).

5 **SEQUENTIAL EVALUATION PROCESS**

6 The Social Security Act (the "Act") defines "disability" as
7 the "inability to engage in any substantial gainful activity by
8 reason of any medically determinable physical or mental impairment
9 which can be expected to result in death or which has lasted or
10 can be expected to last for a continuous period of not less than
11 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
12 Act also provides that a Plaintiff shall be determined to be under
13 a disability only if his impairments are of such severity that
14 Plaintiff is not only unable to do his previous work but cannot,
15 considering Plaintiff's age, education and work experiences,
16 engage in any other substantial gainful work which exists in the
17 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
18 Thus, the definition of disability consists of both medical and
19 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
20 (9th Cir. 2001).

21 The Commissioner has established a five-step sequential
22 evaluation process for determining whether a person is disabled.
23 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
24 engaged in substantial gainful activities. If he is, benefits are
25 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the
26 decision maker proceeds to step two, which determines whether
27 Plaintiff has a medically severe impairment or combination of
28 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

If Plaintiff does not have a severe impairment or combination

1 of impairments, the disability claim is denied. If the impairment
2 is severe, the evaluation proceeds to the third step, which
3 compares Plaintiff's impairment with a number of listed
4 impairments acknowledged by the Commissioner to be so severe as to
5 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
6 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
7 meets or equals one of the listed impairments, Plaintiff is
8 conclusively presumed to be disabled. If the impairment is not
9 one conclusively presumed to be disabling, the evaluation proceeds
10 to the fourth step, which determines whether the impairment
11 prevents Plaintiff from performing work he has performed in the
12 past. If Plaintiff is able to perform his previous work, he is
13 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
14 cannot perform this work, the fifth and final step in the process
15 determines whether Plaintiff is able to perform other work in the
16 national economy in view of his residual functional capacity and
17 his age, education and past work experience. 20 C.F.R. §§
18 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

19 The initial burden of proof rests upon Plaintiff to establish
20 a *prima facie* case of entitlement to disability benefits.
21 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
22 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
23 met once Plaintiff establishes that a physical or mental
24 impairment prevents him from engaging in his previous occupation.
25 The burden then shifts to the Commissioner to show (1) that
26 Plaintiff can perform other substantial gainful activity and (2)
27 that a "significant number of jobs exist in the national economy"
28 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
(9th Cir. 1984).

STANDARD OF REVIEW

1
2 Congress has provided a limited scope of judicial review of a
3 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
4 the Commissioner's decision, made through an ALJ, when the
5 determination is not based on legal error and is supported by
6 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
7 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
8 1999). "The [Commissioner's] determination that a plaintiff is
9 not disabled will be upheld if the findings of fact are supported
10 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
11 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence
12 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
13 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance.
14 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
15 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
16 573, 576 (9th Cir. 1988). Substantial evidence "means such
17 evidence as a reasonable mind might accept as adequate to support
18 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
19 (citations omitted). "[S]uch inferences and conclusions as the
20 [Commissioner] may reasonably draw from the evidence" will also be
21 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
22 On review, the court considers the record as a whole, not just the
23 evidence supporting the decision of the Commissioner. *Weetman v.*
24 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
25 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

26 It is the role of the trier of fact, not this court, to
27 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
28 evidence supports more than one rational interpretation, the court
may not substitute its judgment for that of the Commissioner.

1 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
2 (9th Cir. 1984). Nevertheless, a decision supported by
3 substantial evidence will still be set aside if the proper legal
4 standards were not applied in weighing the evidence and making the
5 decision. *Browner v. Secretary of Health and Human Services*, 839
6 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
7 evidence to support the administrative findings, or if there is
8 conflicting evidence that will support a finding of either
9 disability or nondisability, the finding of the Commissioner is
10 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
11 1987).

12 ALJ'S FINDINGS

13 The ALJ found at step one that Plaintiff has not engaged in
14 substantial gainful activity since her alleged onset date. (AR
15 24). At step two, the ALJ determined that Plaintiff has the
16 severe impairments of left shoulder impairment, gastroesophageal
17 reflux and obesity, but that she does not have an impairment or
18 combination of impairments listed in or medically equal to one of
19 the Listings impairments. (AR 31). With regard to Plaintiff's
20 impairments, the ALJ also noted as follows: Plaintiff has a past
21 history of sinusitis, alleviated with surgery; she has been
22 diagnosed with irritable bowel syndrome, although no
23 gastrointestinal symptoms were reported and no evaluation was
24 undertaken; she has complained of dizziness but the dizziness was
25 related to her sinus condition which has been alleviated with
26 surgery; her migraine headaches are successfully treated with
27 medication; she has reported that she suffers from depression
28 which is inconsistent with her ability to perform her household
chores, socialize, care for her children and take vacations; her

1 complaints of low back, hip and neck pain are not supported by the
2 evidence of record, her presentation to treating physicians, x-ray
3 evidence, or her activities of daily living; and, she suffers from
4 carpal tunnel syndrome, which is not severe and causes no
5 functional limitations. (AR 31).

6 The ALJ concluded that, during the relevant period, Plaintiff
7 retained the residual functional capacity ("RFC") to preform a
8 limited range of light exertion work or that she would be
9 precluded from work requiring the ability to occasionally lift or
10 carry more than 20 pounds, frequently lift or carry more than 10
11 pounds, reach above shoulder level with the non-dominant left
12 upper extremity, climb ropes, ladder or scaffolds as well as
13 crawl, engage in activities requiring exposure to extremes of
14 temperatures or humidity or requiring more than moderate exposure
15 to fumes or odors, and to use the left upper extremity to push or
16 pull, below shoulder height, more than 10 pounds frequently or 20
17 pounds occasionally. (AR 32-33).

18 At step four of the sequential evaluation process, the ALJ
19 found that Plaintiff was able to perform her past relevant work as
20 a cashier and as a waitress. (AR 33). Accordingly, the ALJ
21 determined at step four of the sequential evaluation process that
22 Plaintiff was not disabled within the meaning of the Social
23 Security Act. (AR 33-34).

24 ISSUES

25 Plaintiff contends that the Commissioner erred as a matter of
26 law. Specifically, she argues that:

27 1. The ALJ improperly relied on the testimony of the
28 medical expert, Dr. Craig, over the opinions of Plaintiff's
treating physician, Dr. Alcaraz, to erroneously conclude that

1 Plaintiff had the RFC to perform a limited range of light exertion
2 work; and

3 2. The ALJ failed to provide adequate reasons for rejecting
4 her testimony regarding her need to take naps throughout the day.

5 This Court must uphold the Commissioner's determination that
6 Plaintiff is not disabled if the Commissioner applied the proper
7 legal standards and there is substantial evidence in the record as
8 a whole to support the decision.

9 DISCUSSION

10 **A. RFC Assessment**

11 Plaintiff contends that the ALJ erred by finding that
12 Plaintiff retained the RFC for a limited range of light exertion
13 work activities. (Ct. Rec. 12, pp. 12-16). Plaintiff
14 specifically asserts that the ALJ failed to provide specific and
15 legitimate reasons for rejecting the medical opinions of treating
16 physician Veronique T. Alcaraz, M.D., and incorrectly relied upon
17 the testimony of the medical expert, Dr. Craig. (Ct. Rec. 12, pp.
18 13-16). Plaintiff argues that the ALJ should have credited Dr.
19 Alcaraz' opinion that Plaintiff was permanently disabled and
20 severely limited in the ability to walk due to arthritic,
21 neurological or orthopaedic condition. (Ct. Rec. 12, p. 14; AR
22 256). The Commissioner responds that the ALJ properly evaluated
23 the medical evidence of record and properly relied upon the
24 opinion of Dr. Craig. (Ct. Rec. 15, pp. 7-14).

25 The courts distinguish among the opinions of three types of
26 physicians: treating physicians, physicians who examine but do
27 not treat the claimant (examining physicians) and those who
28 neither examine nor treat the claimant (nonexamining physicians).
Lester v. Chater, 81 F.3d 821, 839 (9th Cir. 1996). A treating

1 physician's opinion is given special weight because of his
2 familiarity with the claimant and her physical condition. *Fair v.*
3 *Bowen*, 885 F.2d 597, 604-05 (9th Cir. 1989). Thus, more weight is
4 given to a treating physician than an examining physician.
5 *Lester*, 81 F.3d at 830. However, the treating physician's opinion
6 is not "necessarily conclusive as to either a physical condition
7 or the ultimate issue of disability." *Magallanes v. Bowen*, 881
8 F.2d 7474, 751 (9th Cir. 1989) (citations omitted).

9 The Ninth Circuit has held that "[t]he opinion of a
10 nonexamining physician cannot by itself constitute substantial
11 evidence that justifies the rejection of the opinion of either an
12 examining physician or a treating physician." *Lester*, 81 F.3d at
13 830. Rather, an ALJ's decision to reject the opinion of a
14 treating or examining physician, may be *based in part* on the
15 testimony of a nonexamining medical advisor. *Magallanes*, 881 F.2d
16 at 751-55; *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995).
17 The ALJ must also have other evidence to support the decision such
18 as laboratory test results, contrary reports from examining
19 physicians, and testimony from the claimant that was inconsistent
20 with the physician's opinion. *Magallanes*, 881 F.2d at 751-52;
21 *Andrews*, 53 F.3d 1042-43. Moreover, an ALJ may reject the
22 testimony of an examining, but nontreating physician, in favor of
23 a nonexamining, nontreating physician only when he gives specific,
24 legitimate reasons for doing so, and those reasons are supported
25 by substantial record evidence. *Roberts v. Shalala*, 66 F.3d 179,
26 184 (9th Cir. 1995).

27 The ALJ examined the evidence of record, consisting of
28 laboratory test results, reports from treating, examining and
reviewing physicians, and the testimony of the medical expert, and

1 determined that Plaintiff has the RFC to perform a limited range
2 of light exertion work. (AR 25-28, 32-33). In making this RFC
3 finding, the ALJ adopted the assessment of the medical expert, Dr.
4 Craig, finding that his assessment was consistent with the
5 findings of the reviewing state agency physician and accurately
6 reflected the evidence of record. (AR 32). In making her RFC
7 determination, the ALJ also concluded that the application for a
8 disability parking permit signed by Dr. Alcaraz, Plaintiff's
9 treating physician, was not persuasive evidence. (AR 32).

10 Dr. Alcaraz noted in letters on July 18, 2002, and again on
11 March 24, 2005,² that Plaintiff has musculoskeletal problems which
12 prevent her from seeking employment. (AR 153, 259). On December
13 11, 2003, Dr. Alcaraz also filled out a Disabled Person's Parking
14 Privileges Individual Application for Plaintiff. (AR 256). Dr.
15 Alcaraz checked a box indicating that Plaintiff was permanently
16 disabled and was severely limited in her ability to walk due to an
17 arthritic, neurological, or orthopedic condition. (AR 256). The

19 ²As noted by the Commissioner, the March 24, 2005 letter is post-
20 decision evidence that was not before the ALJ, but was drafted and presented
21 to the Appeals Council only. (Ct. Rec. 15, pp. 10-14). This court has
22 jurisdiction to remand matters on appeal for consideration of new evidence.
23 *Goerg v. Schweiker*, 643 F.2d 582, 584 (9th Cir. 1981); 42 U.S.C. § 405(g).
24 Section 405(g) expressly provides for remand where new evidence is material
25 and there is good cause for the failure to incorporate the evidence in a
26 prior proceeding. *Burton v. Heckler*, 724 F.2d 1415, 1417 (9th Cir. 1984).
27 To be material, the new evidence must bear directly and substantially on the
28 matter in issue. *Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir. 1985). Also,
there must be a reasonable possibility that the new evidence would have
changed the outcome if it had been before the Secretary. *Booz v. Secretary
of Health and Human Services*, 734 F.2d 1378, 1380-81 (9th Cir. 1984).
Although the undersigned recognizes that this new evidence likely would not
have changed the outcome of this case because, as indicated by Plaintiff
herself, it "basically mirrored" the previous letter by Dr. Alcaraz (Ct. Rec.
12, p. 14), the Court shall consider whether the ALJ's RFC decision was
supported by substantial evidence and free from legal error while
reviewing the entire record, including the additional evidence of Dr.
Alcaraz' March 24, 2005 letter. (AR 259). Since the Court ultimately
upholds the ALJ's decision herein, considering the new evidence does not
result in prejudice to either party.

1 ALJ considered the records of Dr. Alcaraz and specifically
2 rejected her assessments as conclusory, unsupported by her
3 treatment notes, and unsupported by her prescribed treatment plan.
4 (AR 25-32). The undersigned agrees with the ALJ's analysis in
5 this regard. Each of the letters and the disabled parking
6 application provide no discussion of limitations. The letters and
7 application only provide a conclusory opinion regarding
8 Plaintiff's condition with no supporting bases for the stated
9 conclusions therein.

10 The medical expert, Dr. Craig, testified at the
11 administrative hearing that the most reliable medical report of
12 record consisted of the rheumatologist's May 2002 evaluation. (AR
13 133-135, 271). At that time, Plaintiff was diagnosed with mild
14 bilateral carpal tunnel syndrome. (AR 135, 272, 277). Dr. Craig,
15 in concurrence with the rheumatologist's report, opined that
16 Plaintiff's primary limitation was attributable to her left
17 shoulder impairment. (AR 272). Dr. Craig noted that, following
18 surgery on her left shoulder, Plaintiff had some improvement, but,
19 because of the shoulder impairment, determined that Plaintiff
20 would be limited to light work with the requirement of no overhead
21 or above shoulder-height work with the left arm and the need to
22 avoid hard pushing and pulling with the left arm. (AR 273). He
23 further found that Plaintiff should avoid crawling or climbing
24 ladders, but that she had no sitting, standing or walking
25 restrictions.³ (AR 276-277).

27 ³Dr. Craig noted that a recent record reflected that Plaintiff had
28 difficulty with walking because it caused shoulder pain. (AR 276). He
opined that Plaintiff likely just had a low threshold for pain, and he would
not place restrictions on her ability to walk based only on its alleged
effect of causing shoulder pain. (AR 277).

1 Dr. Craig questioned Plaintiff's credibility and indicated
2 that there was no abnormal findings on any physical examination
3 pertaining to her back. (AR 272). It was specifically noted that
4 x-rays of her lumbar spine and left hip were within normal limits.
5 (AR 273-274). Nevertheless, he indicated that any back
6 limitations would be covered under the restriction to light work.
7 (AR 273).

8 Dr. Craig also testified that, following sinus surgery, if
9 Plaintiff had any lingering sinus problems, then she should also
10 be restricted from exposure to air pollutants and that extremes of
11 temperature and humidity may also be a problem. (AR 274-275).
12 While there were some references in the record to migraine
13 headaches, Dr. Craig did not feel that they were particularly
14 bothersome or limiting of employment. (AR 275).

15 The ALJ found that Dr. Craig's assessment was well-reasoned,
16 was explained in detail, was accompanied by references to the
17 evidence of record, accurately reflected the evidence of record
18 and was more persuasive. (AR 32). The undersigned agrees.
19 Moreover, the ALJ's RFC finding is consistent with not only the
20 medical expert's opinion, but also with the opinions of a state
21 agency reviewing physician of record. (AR 32, 156-161).

22 On November 5, 2002, George Rodkey, M.D., reviewed the record
23 and concluded that Plaintiff was limited to occasionally lifting
24 and/or carrying 20 pounds, frequently lifting and/or carrying 10
25 pounds, sitting, standing and/or walking (with normal breaks)
26 about six hours in an eight-hour workday and occasionally reaching
27 overhead with the left upper extremity. (AR 157). Dr. Rodkey

28 ///

1 noted postural, manipulative and environmental limitations
2 consistent with the ALJ's ultimate RFC determination as well. (AR
3 158-159). He opined that Plaintiff's symptoms were somewhat
4 overstated and that the objective evidence did not correlate to
5 the level of reported limitations. (AR 160). Dr. Rodkey also
6 remarked that Dr. Alcaraz' statement that Plaintiff was prevented
7 from seeking employment due to her musculoskeletal problems (AR
8 153) was not supported by the objective evidence which shows that
9 Plaintiff cares for three children and maintains a household (AR
10 160).

11 The ALJ is responsible for reviewing the evidence and
12 resolving conflicts or ambiguities. *Magallanes*, 881 F.2d at 751.
13 If evidence supports more than one rational interpretation, the
14 Court must uphold the decision of the ALJ. *Allen*, 749 F.2d at
15 579. It is the role of the trier of fact, not this Court, to
16 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. The
17 Court thus has a limited role in determining whether the ALJ's
18 decision is supported by substantial evidence and may not
19 substitute its own judgment for that of the ALJ even if it might
20 justifiably have reached a different result upon de novo review.
21 42 U.S.C. § 405(g). In any event, the Court finds that the ALJ
22 provided appropriate rationale for rejecting the conclusory
23 opinions of Dr. Alcaraz and properly supported her RFC finding
24 with credible record evidence, including the testimony of Dr.
25 Craig. Accordingly, the undersigned finds that the ALJ's RFC
26 determination is in accord with the substantial weight of the
27 record evidence and free of error in this case.

28 ///

1 **B. Credibility**

2 Plaintiff also argues that the ALJ erroneously determined
3 that she was not credible. (Ct. Rec. 12, pp. 16-18). She
4 specifically contends that the ALJ failed to provide adequate
5 rationale for rejecting her testimony regarding her need to take
6 naps throughout the day. (Ct. Rec. 12, p. 16). The Commissioner
7 responds that the ALJ's reasoning is persuasive, supported by
8 substantial evidence and free of legal error. (Ct. Rec. 15, pp.
9 14-17).

10 It is the province of the ALJ to make credibility
11 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
12 1995). However, the ALJ's findings must be supported by specific
13 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
14 1990). Once the claimant produces medical evidence of an
15 underlying impairment, the ALJ may not discredit his testimony as
16 to the severity of an impairment because it is unsupported by
17 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
18 1998) (citation omitted). Absent affirmative evidence of
19 malingering, the ALJ's reasons for rejecting the claimant's
20 testimony must be "clear and convincing." *Lester v. Chater*, 81
21 F.3d 821, 834 (9th Cir. 1995). "General findings are
22 insufficient: rather the ALJ must identify what testimony is not
23 credible and what evidence undermines the claimant's complaints."
24 *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th
25 Cir. 1993).

26 The ALJ considered the evidence and testimony of record and
27 determined that Plaintiff was not credible. (AR 29). In support
28 of her finding in the regard, the ALJ indicated, throughout her

1 decision, several reasons for discrediting Plaintiff's
2 allegations. (AR 25-32). The ALJ noted the following as support
3 for her finding that Plaintiff was not credible:

4 1) On March 30, 2002, Plaintiff advised Dr. Alcaraz that she
5 was leaving on a two week vacation (AR 25); 2) It was noted
6 on May 16, 2003, that Plaintiff was the mother of three young
7 boys and was "very active" (AR 27); 3) On June 25, 2003 she
8 related that she had fallen two days before and landed on her
9 left shoulder, but reported in a different exhibit that she
10 developed recurrence of her left shoulder pain secondary to
11 lying in bed following sinus surgery (AR 27); 4) Plaintiff
12 reported experiencing dizzy spells six times a day, each
13 lasting for about 10 minutes, however, the medical records
14 reveal that she presented with complaints of dizzy spells
15 very infrequently, the symptoms were alleviated with the
16 removal of cerumen, and she had reported dizziness on only
17 one occasion since her sinus surgery and the symptoms did not
18 preclude her ability to attend a Halloween party (AR 29);
19 5) Plaintiff testified that she experiences constant
20 diarrhea, however, the record does not reflect that she
21 reported this symptom to any treating physician or sought
22 treatment for such until November of 2003 (AR 29);
23 6) Plaintiff alleges disability since January of 2002,
24 however, she testified that, prior to her shoulder surgery in
25 May of 2003, she was "fairly active with her kids" which is
26 also consistent with the May 16, 2003 report that she was
27 very active (AR 29); 7) Plaintiff has reported problems with
28 her back and hips, however, evaluations show no abnormalities
and no evidence of abnormality were shown in x-rays (AR 29);
8) Plaintiff has reported that she wears knee braces on both
knees due to pain and swelling, however, knee x-rays were
negative, and the record does not evidence that she returned
to her physician with complaints of continued knee pain or
swelling thereafter (AR 29-30); 9) Plaintiff has reported she
experiences tingling down her left arm for the past three
years, however, the record reflects that she has denied any
tingling in her arm when questioned for purposes of treatment
(AR 30); 10) With regard to her complaints of difficulty with
grasping and holding, at the time Plaintiff applied for
benefits, she did not report difficulty holding or gripping,
she did not report an inability to bend her fingers on most
days, and she was provided with wrist braces prior to nerve
conduction studies which revealed no abnormalities and has
not sought further treatment for this condition (AR 30);
11) While Plaintiff reports she experiences disabling
migraine headaches requiring her to rest all day, the record
does not reflect that her headaches are not controlled with
medication or that her headaches persisted following sinus
surgery (AR 30); 12) Plaintiff's testimony regarding her
inability to raise her left arm up to shoulder height is
inconsistent with the record evidence which shows that, in
September of 2003, she was functioning well with her
shoulder, and, when she returned with recurrence of her
shoulder pain, it was thought that the pain was acute and

1 would resolve with time, and Plaintiff did not return for
2 further treatment or with persisting complaints thereafter
(AR 30); 13) Plaintiff reported that she cannot drive because
3 she is afraid her dizzy spells or migraines would cause an
accident, however, the record reflects that Plaintiff has
4 never obtained a driver's license (AR 30); and 14) Testimony
that Plaintiff needs to take daily naps is not supported by
5 any reports to treating physicians, request for treatment for
such a condition, or by any diagnosis of record, and it is
6 inconsistent with her activities of daily living, including
reports that she was able to take vacations and attend social
functions (AR 30-31).

7 The undersigned also finds it significant to note that Dr.
8 Craig questioned Plaintiff's credibility (AR 272), and Dr. Rodkey
9 opined that Plaintiff's symptoms were somewhat overstated and that
10 the objective evidence did not correlate to the level of reported
11 limitations (AR 160).

12 The ALJ documented several inconsistencies, noted a
13 significant lack of evidence to support Plaintiff's overall
14 allegations, noted a lack of medical treatment for Plaintiff's
15 alleged severe limitations and indicated that her alleged symptoms
16 were inconsistent with her activities of daily living. (AR 25-
17 31). After reviewing the record, the undersigned judicial officer
18 finds that the ALJ provided abundant, specific, clear and
19 convincing reasons, supported by substantial evidence in the
20 record, for finding Plaintiff not credible. Accordingly, the
21 Court finds that the ALJ did not err by concluding that Plaintiff
22 was not credible and that her statements concerning her pain,
23 symptoms and limitations were not persuasive. (AR 31).

24 CONCLUSION

25 Having reviewed the record and the ALJ's conclusions, this
26 Court finds that the ALJ's decision is supported by substantial
27 evidence and free of legal error. Based on the foregoing, the
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undersigned finds that the ALJ properly determined that Plaintiff is not disabled within the meaning of the Social Security Act.

Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 11**) is **DENIED**.

2. Defendant's Motion for Summary Judgment (**Ct. Rec. 14**) is **GRANTED**.

3. The District Court Executive is directed to enter judgment in favor of Defendant, file this Order, provide a copy to counsel for Plaintiff and Defendant, and **CLOSE** this file.

DATED this 28th day of July, 2006.

s/Michael W. Leavitt
MICHAEL W. LEAVITT
UNITED STATES MAGISTRATE JUDGE